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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 375

WESTERN CARTRIDGE COMPANY, A CORPORATION,
Petitioner,

VS.

LOUIS L. EMMERSON, SECRETARY OF STATE OF THE STATE OF ILLINOIS,
Respondent.

STATEMENT, BRIEF AND ARGUMENT FOR RESPONDENT.

OSCAR E. CARLSTROM,
Attorney General of Illinois;

BAYARD LACEY CATRON,
Assistant Attorney General,
Counsel for Respondent.

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STATEMENT, BRIEF AND ARGUMENT FOR RESPONDENT.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This case involves the annual license fee or franchise tax imposed by the State of Illinois upon the petitioner for the privilege of carrying on its corporate business in that State for the year commencing July 1, 1927. The Supreme Court of Illinois sustained the validity of the statute and the tax assessed under the pre-

vious decisions of this Court as well as that Court in the case of *Hump Hairpin Mfg. Co.* v. *Emmerson,* 258 U. S., 290, and other cases cited (335 Ill., 150.)

Section 105 of the Illinois Corporation Act, under which the tax in question was assessed, is set forth in the statement of the case by the petitioner. In brief, that section provides that the annual license fee or franchise tax of both domestic and foreign corporations shall be computed at the rate of five cents on each one hundred dollars of the proportion of the issued capital stock represented by business transacted and property located in that State.

The bill of complaint filed by the petitioner shows that it has issued capital stock in the par value amount of $5,701,800. The total amounts of its property was $6,924,804.92, nearly all of which was located in the State of Illinois. Its total business in the preceding year was $11,670,925.51, all of which was transacted at or from its places of business in that State. The annual fee or tax, as computed upon the proportion of capital stock represented by such property and business in that State amounted to $2,808.03. (R. 1.)

In its annual report, the petitioner sought to divide the business transacted by it at or from places of business in Illinois, according to sales made to purchasers

within the State amounting to $1,919,882.73, and the remainder of sales made to purchasers outside the State. In its bill herein, the petitioner alleged that the latter amount should not be included in determining the proportion of its capital stock represented by business transacted and property located in Illinois. The answer of the respondent denied the material allegations of the bill in that respect. (R. 10-12.)

The case was heard upon the bill and answer and a statement of facts made by the petitioner, under a stipulation that such statement might be considered as evidence of such facts presented by the petitioner, so far as competent under the pleadings. This statement showed that the petitioner is engaged in the business of manufacturing and selling small arms ammunition and brasses, with its offices and places of business located in East Alton and Springfield, Illinois. It further showed that the total amount of its sales of such products during the preceding year was $11,670,925.51, of which $9,751,042.78, or about five-sixths of the total amount, consisted of sales made upon offers or orders for goods received at its place of business at East Alton, Illinois, which were there accepted and such goods were then shipped from one of the said factories to the purchasers outside the State. (R. 13-15.)

Since all of the manufacturing business of the petitioner was carried on at its factories in Illinois and its products were shipped from such factories upon orders received and accepted at its offices in that State, the respondent considered all such sales as a part or measure of the business transacted in Illinois. All such business was therefore included as one of the factors in determining the proportion of capital stock represented by the property and business in that State.

Under the formula set forth in Section 106 of the Illinois Corporation Act, the sum of the business transacted and property located in that State is divided by the sum of the total business and property of the corporation everywhere, for the purpose of ascertaining the proportion of its capital stock represented or used in that State. The amount of sales made to residents of other states was therefore only one of the three factors used in determining the proportion of capital stock represented or used in the State, the other two factors being the amount of sales made to purchasers within the State and the amount of property located and used in that State.

Upon the hearing, the trial court sustained the statute and the tax assessed by the Secretary of State and dismissed the bill for want of equity. An appeal was then taken by the petitioner to the Supreme Court of Illinois, which held that the decision of this Court in

the similar case of *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S., 290, which sustained the prior decision of that Court (293 Ill., 387), was controlling in this case, and therefore the decree of the Circuit Court was affirmed.

The position of the respondent here is that all of the business of the petitioner was in fact carried on at its factories and offices in the State of Illinois, and that the amount of sales made was merely taken as a measure or index of the amount of business transacted in that State; that such business, together with the amount of property in Illinois, represented the proportion of capital stock used in that State, upon which the annual franchise tax of petitioner was computed; that a tax assessed in that manner is not a direct tax upon interstate commerce, and did not constitute an illegal burden on any such business of the petitioner, under the prior decisions of this Court.

SUMMARY OF ARGUMENT.

I.

The tax assessed was properly computed under the statute and is constitutional and valid.

The Secretary of State properly considered the amount of sales made by the petitioner at its place of business in Illinois, as showing or measuring the amount of business transacted by it in that State, together with its property located in that State and used in such business, for the purpose of determining the proportion of its capital stock represented by business transacted and property located in that State, upon which its annual license fee or franchise tax was computed.

General Corporation Act, Chap. 32, Secs. 105, 106;

Hump Hairpin Mfg. Co. v. *Emmerson,* 258 U. S., 290, 292, 294; affirming 293 Ill., 387;

American Can Co. v. *Emmerson,* 288 Ill., 289;

Underwood Typewriter Co. v. *Chamberlain,* 254 U. S., 113, 116;

United States Glue Co. v. *Oak Creek,* 247 U. S., 321;

Peck & Co. v. *Lowe,* 247 U. S., 165;

Gilliland Oil Co. v. *State,* 274 U. S., 717; affirming 171 Ark., 415;

International Shoe Co. v. *Shartel,* 279 U. S., 429, 433.

II.

The amount of the business transacted by the petitioner in Illinois was properly ascertained or measured by the amount of sales made of its products at or from its places of business in that state.

The manufacturing operations of the petitioner at its factories in Illinois, the receipt and acceptances of offers or orders for its products at its offices in that State and the shipment of such products from said factories constituted the transaction of business in that State, and the amount of the sales of such products was properly taken as the measure of the amount of such business for the purpose of computing its franchise tax, even though part of such sales were made to residents of other states.

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S., 290, 294; affirming 293 Ill., 387;

Underwood Typewriter Co. v. *Chamberlain*, 254 U. S., 113, 120;

United States Glue Co. v. *Oak Creek*, 247 U. S., 321, 326;

U. S. Express Co. v. *Minnesota*, 223 U. S., 335, 343;

Maine v. *Grand Trunk Ry. Co.*, 142 U. S., 217;

American Can Co. v. *Emmerson*, 288 Ill., 289.

III.

The statute and the tax assessed did not impose any direct or unlawful burden upon any interstate commerce of the petitioner.

The statute and the tax imposed in this case conform to the rule adopted by this Court that, while a state may not regulate interstate commerce or impose a burden upon it, the state may levy a tax within its authority, measured by capital stock in part used in carrying on such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character.

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S., 290, 294;

Underwood Typewriter Co. v. *Chamberlain*, 254 U. S., 113, 120;

United States Glue Co. v. *Oak Creek*, 247 U. S., 321, 326;

Peck & Co. v. *Lowe*, 247 U. S., 165, 173-5;

Kansas City M. & B. R. R. Co. v. *Stiles*, 242 U. S., 111, 119;

Kansas City, etc., Ry. Co. v. *Kansas*, 240 U. S., 227, 234;

Wisconsin & M. R. Co. v. *Powers*, 191 U. S., 379;

Maine v. *Grand Trunk Ry. Co.*, 142 U. S., 217;

St. Louis, etc., Ry. Co. v. *Middlekamp*, 256 U. S., 226, 231;

International Shoe Co. v. *Shartel*, 279 U. S., 429, 433.

IV.

The decision of this Court in the Hump Hairpin case is decisive of the questions involved in the present case.

The facts in the *Hump Hairpin case* and the statute under which the tax was assessed in that case were substantially the same as those involved in the present case, and therefore the decision of this Court on the questions arising in that case are directly applicable and controlling on such questions in the present case.

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S., 290; 293 Ill., 387;

Western Cartridge Co. v. *Emmerson*, 335 Ill., 150; (R. 24-28);

American Can Co. v. *Emmerson*, 288 Ill., 89.

ARGUMENT.

I.

The tax assessed was properly computed under the statute and is constitutional and valid.

The petitioner is a manufacturing corporation, with both its factories and its offices located in Illinois. All of its business is carried on at such places of business in Illinois, and nearly all of its property is located in that State. The small amount of property outside of the State was not considered in computing the amount of its tax.

The business of the petitioner did not consist merely in the final disposition of its products, but included its manufacturing operations in Illinois to produce such goods, the receipt and acceptance of orders or offers for same at its offices in that State, and the shipment of such goods from its factories to purchasers in that and other states. Such business was therefore transacted entirely in Illinois and only the shipment and final delivery of part of the goods to purchasers outside that State had any element of interstate commerce.

The petitioner in its brief refers to the discussion of the nature of its business by the Supreme Court of

Illinois in its opinion in this case. The Court there pointed out that the petitioner's factories and offices were located, its manufacturing operations were conducted, orders for its goods were accepted and shipments of its products originated in that State exclusively. The Court further said, assuming that sales made to residents of other states was interstate business, the fee or tax was not directly imposed or computed upon the proceeds of interstate commerce; that under the statute, other factors necessarily entered into the calculation in determining the proportion of capital stock represented by business transacted and property located in Illinois, and that the tax computed upon such proportion of the capital stock did not constitute a direct or substantial burden upon interstate commerce (R. 28).

That Court also showed that the exact question presented here was considered and decided by this Court in the case of *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S., 290. That case involved a foreign corporation which had its factories and office located in the City of Chicago, where it received and accepted orders for goods sold and shipped such goods to the purchasers in Illinois and other states. The total amount of sales in business during the preceding years was $260,334.96, of which sales made to residents of that State amounted to $25,814,

and the remainder of its sales, being more than nine-tenths of its total sales, were made to residents outside of that State. The Illinois Supreme Court held that all such business was transacted in that State, within the meaning of the Corporation Act, although sales to residents outside the State had some element of interstate commerce, and as all of the property was in Illinois, it was held that the entire amount of capital stock was represented by property located and business transacted in that State (293 Ill. 387, 391).

The corporation in that case brought the case up for review by this Court and urged that the inclusion of all of its business in computing its tax imposed a burden upon its interstate commerce. This Court in its opinion referred to the policy of the State to accord equal treatment to foreign and domestic corporations and discussed the provisions of the statute as applied by the Secretary of State. The Court said that the fact that all of the property of the corporation was located in Illinois and all its manufacturing operations were carried on in that State, and all contracts for sales were approved at its office in that State, certainly reduced the interstate element in its business to the lowest terms. The question therefore was whether the inclusion of such business in determining the amount of tax rendered it invalid.

In considering that question, this Court said that while a state may not use its taxing power to regulate or burden interstate commerce, it is settled that a state excise tax which affects such commerce only incidentally and remotely may be entirely valid, where it is clear that it is not imposed with the covert purpose or the effect of defeating Federal constitutional rights. After stating that taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in determining the amount of a fund on which the tax is assessed, that the principle of such cases must be regarded as an exception to the general rule, the Court said:

> "The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and in fact, distantly affect it.
>
> No formula has yet been devised by which it can be determined in all cases whether or not such a tax is valid; and, applying the repeated declaration of this Court, in the cases cited and in many others, that the question is inherently a practical one, depending for its decision on the special facts of each case, *we are clear that the tax here involved falls within the excepted class described, even though the business done with residents of states other than Illinois be regarded as interstate.*" (Italics ours).

The Court further showed that the statute is not a disguised attempt to tax interstate commerce and that it accords equal treatment to domestic and foreign corporations; that the tax is not imposed directly upon the proceeds of interstate commerce, and is not computed upon it, but that the proceeds of such business is only one of three factors used in determining the amount of capital stock represented by property and business in the State, upon which the tax is computed, the other two factors being the amount of property in the State and the amount of business done with residents of that State, and the Court in conclusion held that at most the assessment, so far as interstate commerce was concerned, was incidental, remote and unimportant and that it was therefore constitutional and the judgment was affirmed.

The Court in that case referred to the recent decision of the Illinois Supreme Court in *American Can Co.* v. *Emmerson,* 288 Ill., 289, in which that Court held that it had been the policy of that State since 1872 to accord precisely equal treatment to domestic and foreign corporations of like character. The Court in that case, after discussing several decisions of this Court which held in substance that the receipts or earnings derived from business, including interstate commerce, might properly be taken as the measure of the value of the business or

property in the state, for the purpose of computing a franchise tax, referred to the rule applied by this Court in such cases as follows (p. 303);

> The rule adopted by the United States Supreme Court is that while a state may not regulate interstate commerce or impose burdens upon it, it is authorized to levy a tax within its authority, measured by the capital stock in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. *Kansas City Railroad Co.* v. *Stiles*, 242 U. S., 111; *Northwestern Mutual Co.* v. *Wisconsin*, 247 id, 132; *United States Glue Co.* v. *Oak Creek*, 247 id., 331; *Baldwin Tools Works* v. *Blue*, 240 Fed., 202."

The decision in the *Hump Hairpin* case is supported by several other cases there cited, in which a fund derived in part from the proceeds of interstate commerce was used in computing the tax assessed. The same principle has been applied in many subsequent cases. A leading case on this point is *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S., 113. That case involved an annual franchise tax imposed by the State of Connecticut upon the net income of manufacturing and trading corporations carrying on business in that State. The tax was computed upon the proportion of the whole net income of a foreign corporation, which the value of its real and tangible personal property in the state bore to all such property of the corporation everywhere.

All of the manufacturing business of the corporation was done in that State, as in the present case, but it had branch offices for the sale and repair of its machines in other states. Under the above formula, 47 percent of its profits were allocated to Connecticut and the tax was computed on that basis, although only a little over 3 percent of its profits were made from sales in that State. It was contended by the corporation that such a tax imposed a burden upon its interstate commerce and business in other states. The Court held, however, that the profits were earned largely by the use of property within the taxing state, and that a tax measured by such profits was entirely valid, even though derived in part or mainly from interstate commerce.

This Court has also sustained a similar tax assessed in several later cases cited in our brief. In the recent case of *Gilliland Oil Co.* v. *Arkansas*, 274 U. S., 717, this Court sustained the validity of the Arkansas statute, which imposed a franchise tax measured by property owned and business transacted in that State, taking no par value stock at $25 per share. It was stipulated in the record in that case that more than 50 percent of the products of the corporation in that State were sold and transported by it in interstate commerce. The corporation contended that the inclusion of the amount of such

sales as business transacted in the State in computing its tax imposed a burden on its interstate commerce. The Arkansas Supreme Court upheld the validity of the statute and the tax assessed on that basis (171 Ark., 415), and that decision was affirmed by this Court in a *per curiam* order, on the authority of *Underwood Typewriter Co.* v. *Chamberlain* and other cases cited.

The very recent decision of this Court in *International Shoe Co.* v. *Shartel*, 279 U. S., 429, likewise supports the decision in the present case. The Missouri statute in that case imposed an annual franchise tax on the outstanding capital stock and surplus employed in business by the corporation within the State. For the purpose of ascertaining the amount of the tax, a corporation was deemed to have employed within the State "that proportion of its entire capital stock and surplus that its property and assets in the State bears to all its property and assets wherever located." (p. 431). In considering the objection that the tax computed on that basis imposed a burden on the interstate commerce in which the corporation was engaged, the Court said, at page 433:

> "A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce. *St. Louis-San Francisco Ry.* v. *Middlekamp*, 256 U. S., 226, 231; *Hump Hair-*

pin Co. v. *Emmerson*, 258 U. S., 290; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S., 113, 119; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S., 350; *Kansas City, &c. Railway Co.* v. *Botkin*, 240 U. S., 227; *Kansas City &c. R. R. Co.* v. *Stiles*, 242 U. S., 111; *Southern Railway Co.* v. *Watts*, 260 U. S., 519; cf. *United States Glue Co.* v. *Oak Creek*, 247 U. S., 321; *Shaffer* v. *Carter*, 252 U. S., 37."

In view of the approval in this recent decision by the Court of the cases above cited, including the *Hump Hairpin* case, in which the Illinois statute was directly upheld in a case similar in every respect to the present case, it appears that a further discussion of the other cases cited is unnecessary. These decisions were controlling upon the Illinois Supreme Court and were therefore properly followed by that Court in this case.

II.

The amount of the business transacted by the petitioner in Illinois was properly ascertained or measured by the amount of sales made of its products at or from its places of business in that State.

The petitioner under Point II of its Brief cites several cases in support of the statement that transactions consisting of shipments of goods from Illinois to purchasers in other states are interstate commerce, citing the *Hump Hairpin* case and other cases. It is further said that the Supreme Court of Illinois in its opinion admitted that such business was interstate commerce, but

"seemed to be influenced by the facts that the factories and offices of petitioner were located in Illinois, that its manufacturing operations were conducted there, and that orders were accepted and shipments originated there."

This Court held in the *Hump Hairpin* case that such facts were sufficient to justify the inclusion of such business in determining the amount of tax to be assessed, and that such a tax did not impose any direct or substantial burden upon interstate commerce. It has been repeatedly held in many cases that a franchise tax may be entirely valid, although measured by a fund in part derived from the proceeds of interstate commerce, or by property or capital used in part in such commerce.

None of the other cases cited by the petitioner are based upon any similar state of facts. In *Heyman* v. *Hayes,* 236 U. S., 178, a mail order business consisting simply in the shipment of liquor from Tennessee to purchasers in other states was held not subject to a tax. In *Crew Levick Co.* v. *Pennsylvania,* 245 U. S., 292, it was likewise held that a corporation which merely sold and delivered merchandise at wholesale from its warehouse in that State to purchasers in other states, was not subject to an annual mercantile license tax on such business.

In *Eureka Pipeline Co.* v. *Hallanan,* 257 U. S., 365, a statute which sought to impose a state tax upon the

transportation of oil by pipeline was held invalid, so far as it was measured by quantities received in but moving out of the state. In *Airway Electric Appliance Corp.* v. *Day,* 266 U. S., 71, a statute of Ohio which measured a tax by authorized capital stock was held invalid for the reason that nearly seven-eighths of which was unissued. In the last case cited, *New Jersey Bell Telephone Co.* v. *State Board of Taxes and Assessments,* a tax measured by the proportion of gross earnings represented by lines in public places in the State was held invalid on account of being imposed directly to gross earnings derived from interstate business.

It is apparent that none of these cases, except the *Hump Hairpin* case, is applicable to the facts in the present case, and they therefore have no value in determining the question here involved. This Court has said repeatedly that every case involving the validity of a tax must be decided upon its own facts, and that the facts upon which other cases were decided must be considered, in attempting to apply them to alleged similar cases. A consideration of the facts in the above cases relied on by the petitioner will show that they are not applicable to the present case.

III.

The statute and the tax assessed thereunder did not impose any direct or illegal burden upon any interstate commerce of the petitioner.

The petitioner asserts repeatedly in its brief that the tax assessed is a direct burden upon its interstate commerce and that a part of the tax was in fact assessed upon such commerce. The formula set out by the petitioner on page 14 of its brief shows that this assumption is not well founded. The alleged interstate business is only one of three elements used or considered in determining the proportion of capital stock represented by the business transacted and property located in Illinois. The tax is computed upon the proportion of capital stock so represented or used, and is not imposed directly upon any intrastate commerce or the proceeds thereof.

The petitioner seeks to exclude from the formula all of its business represented by sales made to purchasers outside the State. In so doing, the petitioner disregards the business carried on in its manufacturing operations in its factories in Illinois, together with the receipt and acceptance of orders for its goods at its office in that State, and considers solely the sale and shipment of its goods from its factories to purchasers in other states. That portion of its business is only the final act in disposing of goods produced by its manufacturing operations in the State, which determine the cost and value of such goods upon which the sales are made.

If the tax here had been computed on the capital stock represented by property admittedly used in Illinois

in producing the goods sold, it would have been very slightly less than the tax assessed, as suggested by the Court in the *Hump Hairpin* case (p. 295–6). Such a tax would have been entirely valid, although a part of such capital or property was used in producing goods sold in interstate commerce, as held by this Court in the *International Shoe Company* case (p. 433).

The bill in this case shows that 99.52 percent of the property of the petitioner is located and used in business in Illinois and that such property amounts to $1,193,103 more than the total amount of its issued capital stock. Although nearly all of the capital stock is used in such property in Illinois in producing the goods sold, the formula used by the petitioner would limit or restrict its franchise tax to only 52.2 percent of its capital stock, and exclude the remainder of such stock represented and used in its property and business in Illinois.

There is no proper basis for the attempt of the petitioner to allocate nearly one-half of its capital stock and property used in business in Illinois to interstate commerce alone, and thus to exclude such portion of the capital stock from consideration in computing its franchise tax. All of such stock is invested in the property used in business in that State and no part of it is set aside or used for carrying on business in interstate commerce.

All of such property was used in business within the State and therefore such busines is properly considered in connection with the property located in the State, in determining the amount of capital stock represented or used in Illinois, upon which the tax is computed. The amount of the tax does not vary directly with the amount of interstate business, or the business which has some element of interstate commerce, and does not increase or decrease in proportion to such commerce, as asserted by the petitioner in its brief . This Court has held that the statute does not impose a direct tax upon interstate commerce or the proceeds of such commerce. Neither does it accomplish any such a purpose and it is not intended to have that effect. The statute is clearly intended to and does apply only to capital stock represented by business carried on with the property located in the State.

The cases referred to by the petitioner here are not in point, as heretofore indicated herein. The statute considered in the recent New Jersey case imposed a direct tax on the gross receipts, part of which were derived from interstate commerce and therefore was held invalid to that extent. In the *Crew Levick* case, the tax was computed directly and solely on the proceeds of foreign commerce and was held invalid for that reason. The statement made by the Court in that case cannot properly be so adapted or changed as to apply to the statute and the

tax imposed in the present case, and the attempt of the petitioner to do so entirely misconstrues the provisions and effect of the statute.

There is no attempt in the present case to require a foreign corporation to submit to a tax on its interstate business as a condition to its right to do a local business within the State. Therefore, the case of *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, which sought to impose a license fee based upon the entire capital stock of the corporation, and other similar cases cited by petitioner, are entirely inapplicable to the present case. None of the principles set forth in those cases and quoted by the petitioner are violated or infringed upon by the statute and the tax here involved. The statement quoted from the *Airway* case referred to the tax rate as applied to a large amount of unissued stock, which necessarily imposed a burden on the interstate commerce of the corporation.

In the present case, the tax is computed only upon the proportion of issued capital stock represented by business transacted and property located in the State. Nearly all of the property of the corporation is located in Illinois and is used in carrying on manufacturing operations in that State. All of the business resulting from the use of such property in the State was therefore properly included, even though some of the products of

such business was sold and shipped to purchasers outside the State. The tax was computed solely on the proportion of issued capital stock so used or represented in the State.

The case of *International Paper Co.* v. *Massachusetts*, 246 U. S., 135, is not at all applicable. The tax there was imposed on the entire authorized capital stock of a foreign corporation having only a small part of its property and business in Massachusetts and with a large amount of property and business in other states and used in interstate commerce. There is no similarity of the facts in that case to the conditions in the present case.

As above shown, the petitioner is entirely unjustified in assuming that nearly one-half of its capital stock represents interstate commerce. No specific amount of its stock represents such commerce and no tax is imposed or computed on that basis. The proportion of capital stock on which the tax was computed was actually invested in property in Illinois and was used in carrying on business in that State. There was no ground for excluding nearly one-half of the amount of such stock in computing and assessing a franchise tax for the privilege of doing business in that State.

The attempt of the petitioner to disregard all of the business carried on in the State which resulted in the sale of its products outside the State is a misconception

of the provisions of the statute and the operations included in the business transacted. The exclusion of all such operations in carrying on the business, merely because the sale and final disposition of the products of such business had some element of interstate commerce, would disregard the material and substantial operations which produced and gave value to the goods and made possible the final sale and disposition of the products of the business. Such a view of the statute involved has been repeatedly condemned by this Court, in holding in the case of *Postal Telegraph Co.* v. *Adams*, 155 U. S., 688, 698, and many subsequent cases, that "the substance and not the shadow determines the validity of the exercise of the power."

IV.

The decision of this court in the Hump Hairpin case is decisive of the questions involved in the present case.

The petitioner under Point IV of its brief contends that the Supreme Court of Illinois was incorrect in stating that the decision of this Court in the *Hump Hairpin* case is decisive of the present case. The similarity of the statute and facts discussed by that Court and heretofore referred to in this brief clearly support such statement of the Court.

The purpose of the statute and the State Court not to impose any burden on interstate commerce, as stated

by this Court in that case, is still maintained and shown by substantially the same statute and the similar decision of that Court in this case. That Court assumed in its opinion in this case, in conformity with the view of this Court in the former case, that the sales to residents of other states was interstate business, but held pursuant to the decision of this Court that the business carried on in the State, as measured by such sales, was properly included in determining the amount of capital stock on which the tax was computed.

The petitioner assumes that in the prior case, as well as in this case, the State in computing the tax erroneously treated interstate business as intrastate, and that under the statement quoted, such supposed error should be corrected in this case. The Court merely stated in that case that if such an error had been made, it should be corrected in a proper case. The decisions of both Courts showed, however, that no such error was in fact made. Consequently, there was no reason, in either that case or the present case, for any correction in the computation of the tax.

It appears that the petitioner has entirely misconstrued the views expressed by the Court and the basis on which the statute and tax assessed was sustained. This Court clearly held that under the facts, the tax was prop-

erly computed on the capital stock represented by the property used and business carried on in the State, although the greater part of the products were sold and shipped in interstate commerce. The statute and the facts in the present case are substantially the same as in the prior case and therefore the same principles are applicable here.

This Court no doubt has the right to correct the amount of the tax, if any error was made in the computation, or in case any portion of the tax should be invalid. No such error appears to have been made or any invalidity exist, however, under the prior decisions of this Court in similar cases. The petitioner apparently concedes that this Court so held in the *Hump Hairpin* case, but seeks to discredit that decision and its controlling effect here.

The cases cited for that purpose involved materially different questions and facts. The *Airway* case, as already shown, involved a tax measured by a large amount of unissued stock, which afforded no basis for the tax assessed and therefore imposed an illegal burden on interstate commerce. There is no similarity between that case and the present case, in which the tax was measured by issued stock actually invested in the property used in business in the State. No part of the business carried on with such property so used can properly be excluded in determining the amount of stock represented by property and business in the State.

The petitioner refers to the holding of this Court in the *Hump Hairpin* case that the tax, so far as interstate commerce was concerned, was incidental, remote and unimportant, and that it was therefore constitutional, and suggests that this Court has held in two recent cases that even a slight burden may not be imposed upon such commerce. The Court so held in the cases cited on the ground that there was no legitimate basis for the tax imposed in those cases. If there is a proper basis for the tax, that principle does not apply, as shown by numerous decisions of this Court, but the assessment is valid, even though it may have an indirect or incidental effect on interstate commerce.

The cases referred to in the *Hump Hairpin* case sustain the decision in that case in principle, although the tax in some cases was computed upon a fund derived from business, instead of capital stock used in such business. In *Underwood Typewriter Co.* v. *Chamberlain* and some other cases, an annual tax was imposed in addition to the general property tax, but the same principle was applied as in the prior cases.

This is an excise or franchise tax for the privilege of doing business in the State, which is measured by the capital stock represented or used in business and property in the State, and not in any sense by gross receipts,

as stated by petitioner. The tax is not imposed on either gross receipts or property, and therefore has no similarity to the tax considered by this Court in the *New Jersey Bell Telephone* case.

Neither was the tax imposed on stock representing interstate business, and no such admission has been made, as assumed by petitioner. Such a conclusion is due to an erroneous conception of the basis on which the tax was computed. No attempt is made to impose a tax on interstate commerce as a condition for doing a local business or otherwise, and no case holds that the tax imposed has any such effect.

It seems clear that the statute and the tax assessed thereunder does not impose any direct or substantial burden on interstate commerce, when properly understood. The statute as applied has been directly sustained by this Court and is in harmony with the principles applied in many cases. No reason is shown for disregarding prior decisions and principles heretofore applied in such cases, and it is therefore urged that the decision of the Supreme Court of Illinois in this case be affirmed.

Respectfully submitted,

OSCAR E. CARLSTROM,
Attorney General of Illinois;

BAYARD LACEY CATRON,
Assistant Attorney General,
Counsel for Respondent.